Office Supreme Court, U.S.
FILED
AUG 24 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 197

G. L. CHRISTIAN AND ASSOCIATES, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For a Writ of Certiorari to the United States Court of Claims

PETITIONER'S REPLY TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION

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PRESENT PETITION BASED ON SUBSEQUENT EVENTS

The Government's opposition to the issuance of a writ is based not on its merits but almost entirely upon the Government's assertion that "This is petitioner's fourth attempt to obtain review by this Court. . . ." (Mem., p. 1.) This assertion is only partially correct. In the context of events occurring subsequent to peti-

tioner's original request for review and the chronological development of the litigation, the Government's assertion is misleading and does not present a sufficient ground for denial of the present petition. The present petition is based on events occurring *after* the denial of the previous requests for review. Certiorari is sought to review the order of the Court of Claims entered May 3, 1965 denying petitioner's Motion for Relief Under Rule 69(b)(2)(5) and (6).

In its original petition, petitioner could only predict that chaos and confusion and a seriously detrimental effect on the Government's multibillion dollar procurement efforts would result from the decision below. In its present petition, petitioner is able to demonstrate that its predictions of chaos and confusion were conservatively understated. The General Services Administration, the principal drafter of government procurement regulations, has publicly proclaimed the incorrectness of the decision below.[1] So far reaching and so deleterious would be the application of the "Christian Rule" that the boards of contract appeals and the General Accounting Office have refused to follow it.[2] The Court of Claims itself also has refused to follow the "Christian Rule."[3] For these reasons, the Government's opposition, based upon its misleading allegation that "This is petitioner's fourth attempt to obtain review . . .," is a *non sequitur* and entirely misses the thrust of petitioner's request that subsequent events demonstrate the importance and wide reaching effects of the decision below.

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[1] Petition, p. 8.

[2] Cases cited and discussed, Petition, pp. 10-12.

[3] Cases cited, Petition, p. 14.

THREE EVENTS OCCURRING SUBSEQUENT TO THE FILING OF THIS PETITION ON MAY 28, 1965 FURTHER REQUIRE THE GRANTING OF THIS PETITION

In demonstration of the continuing confusion, inconsistency and chaos resulting from the decision below petitioner brings to the Court's attention the following three events occurring *after* the filing of *this* petition on May 25, 1965.

1. On August 5, 1965 petitioner was served in an action brought by one of its subcontractors for recovery of $157,924.20 as its anticipated profits under its subcontract with petitioner.[4] Contrary to the principles governing the relationship between the Government and subcontractors under Government contracts as contained in this Court's decision in *Merritt* v. *United States,* 267 U.S. 338 (1925) and many of its own decisions, the Court of Claims held in the decision below that the ASPR Convenience Termination article was incorporated by law not only into the prime contract but also into petitioner's *subcontracts* and thereby precluded petitioner's recovery of anticipated profits on behalf of its subcontractors.[5]

As a result, petitioner may now be in a position where, if traditional law as interpreted by this Court is applied in the District Court, it will be liable to its subcontractor for anticipated profits but will be unable to recover and recoup such amounts from the Government whose action in terminating the prime contract solely gave rise to the liability. Petitioner

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[4] *Air-Way Corp.* v. *Centex Corp.* (formerly known as Centex Construction Co., Inc.), USDC ND Ill. (Eastern Div) No. 65c 1231.

[5] Discussion, Petition, pp. 15, 16.

thus is placed in the middle where it is exposed to substantial liability [6] because of the failure of the court below to follow this Court's long-established precedent that there is no privity of contract between the Government and subcontractor under a Government contract.

2. On August 2, 1965 Commissioner C. Murray Bernhardt of the Court of Claims refused to apply the "Christian Rule" against the Government.[7] The contract in the *Thompson Ramo Wooldridge* case contained, as part of the additional general provisions, the standard Government-Furnished Property clause whereby the Government warranted the suitability of the property it furnished. The contract also contained in the schedule an exculpatory clause purporting to disclaim any warranty as to the condition of the Government-furnished property. Plaintiff therein argued, on the basis of the "Christian Rule" that the warranty of the Additional General Provisions must prevail over the disclaimer of the Schedule because the General Provision clause was mandatory and had the force and effect of law. Since the decision below in this case holds that Government agents (except the Secretary of Defense) cannot omit a mandatory ASPR clause from a contract, it necessarily follows they cannot include such clauses and then negate their effect by an inconsistent clause.

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[6] Subcontractor loss of profit claims total $773,552.92 per Finding No. 40. Ct. Cl. Dec. Jan. 11, 1963, p. 50. Petition, Appendix A.

[7] Opinion and Recommended Conclusions of Law of the Commissioner on Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment by Commissioner C. Murray Bernhardt dated August 2, 1965 under Rule 54(b) in *Thompson Ramo Wooldridge, Inc.* v. *United States,* Ct. Cl. No. 104-64. The Commissioner's opinion is reproduced in pertinent part in the Appendix hereto.

Commissioner Bernhardt conceded that this would be a correct application of the "Christian Rule" except for one factor. He stated:

> This is the first attempt to the writer's knowledge to employ the *Christian* doctrine against the Government, and the defendant says it cannot lie because it is settled law that the procurement statutes and regulations are for the benefit of the Government, and a third party cannot complain of any deviation therefrom * * * (at p. 12).

The Commissioner upheld the Government's argument on the authority of *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940) and *United States* v. *New York & Porto Rico S.S. Co.*, 239 U.S. 88, 92 (1915).

Thus, the untenable situation exists where "absent" contract provisions are enforceable against a contractor but not against the Government. The so-called "Christian Rule," as disruptive and confusing as it formerly existed, was at least considered to be a two-way street where *neither* party could rely upon his written contract. Now it has become a one-way street where the Government can indeed rely on the written contract plus absent ASPR clauses incorporated by law but the contractor can do neither.

3. The Court of Claims has created additional confusion in a recent decision. In *Moran Bros., Inc.* v. *United States*, No. 167-63, Ct. Cl., June 11, 1965, the court purported to follow the "Christian Rule" but did not in fact do so. The court held that a regulation of the Atomic Energy Commission allowing 60 days in which to appeal from a decision of the contracting officer governed and not a contract provision allowing only 30 days. This result sounds like the *"Christian*

Rule" but the court made the following statement which is inconsistent therewith.

> We need not decide whether the regulations supercede the contract clause or whether they are to be viewed as having equal vitality, for the result is the same. In the latter alternative, any ambiguity would be resolved against the drawer of the instrument. . . . (Slip Opinion, pp. 4-5.)

The *Christian* case held that mandatory ASPR clauses have the force and effect of law and that accordingly Government agents had *no authority* to deviate from them, *i.e.*, deviate from the law. It is thus inconsistent for the court in the *Moran* case to suggest that the contracting officer's deviation (*i.e.*, the 30-day contract provision) from the law (*i.e.*, the 60-day regulation) might have "equal vitality" with the law. The *Christian* case clearly holds that they do not have "equal vitality"; it makes the mandatory regulation supreme (*i.e.*, the law) and denies the authority of the contracting officer or of any one with less stature than the regulations promulgator, the Secretary of Defense, to change a mandatory regulation. Apparently, the Court of Claims has not understood the decision below and the confusion generated by that decision has begun to generate more confusion within the court itself.

CONCLUSION

The gloomy predictions of chaos, confusion and injustice set forth by petitioner in its first request for review have been fulfilled and exceeded. The contract appeals boards and the General Accounting Office have refused to apply the "Christian Rule." The Court of Claims has also refused to apply it on similar facts. On the one occasion where it did purport to apply the

rule on dissimilar facts, it did not in fact do so and demonstrated its own misunderstanding of the rule. In the midst of the confusion caused by the refusal of the administrative agencies to follow the unpopular and impractical decision below, and the Court of Claims' own confusion as to its meaning, it is not surprising that one of the court's Commissioners would add to the confusion by refusing to enforce the rule against the Government.

In addition, the decision below places prime contractors in an impossible position by making them liable to their subcontractors for acts of the Government without providing recourse against the Government.

The foregoing recital of the growing confusion impeding Government procurement appears to be only the beginning. It is growing daily and gaining momentum. This Court should grant this petition, reverse the decision below and remove the chaos by restoring the law to its former long-established clarity as contained in the decisions of this Court, ignored by the court below, and in the process do justice by enforcing petitioner's contract in accordance with its terms.

Respectfully submitted,

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